STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-704

February 17, 2004

PUBLIC UTILITIES COMMISSION
Investigation of Skowhegan OnLine Inc.'s Proposal for UNE loops

ADDENDUM TO EXAMINER'S REPORT

NOTE: This Examiner's Report is an Addendum to an Examiner's Report issued on December 19, 2003. Parties may file exceptions to this Report by close of business on February 27, 2004. We anticipate that the Commission will consider this case at its deliberative session on March 4, 2004.

I. SUMMARY

In this Addendum to our Examiner's Report of December 19, 2003, we discuss the Commission's authority, pursuant to Sections 251 and 271 of the Telecommunications Act of 1996 (TelAct), to require Verizon-Maine (Verizon) to provision unbundled network element (UNE) copper subloops that terminate on a pole or remote terminal box designated by the competitive local exchange carrier (CLEC). We also address arguments raised by Verizon in its Exceptions that the Federal Communications Commission (FCC) specifically eliminated copper feeder subloops and that the Commission has no authority to require action that conflicts with Verizon's *bona fide request* (BFR) process.

II. BACKGROUND

Our Examiner's Report issued on December 19th contains a detailed description of the background associated with this proceeding. Since the time the Report was issued, Skowhegan OnLine, Inc. (SOI), Cornerstone Communications, Inc.

(Cornerstone), Great Works Internet (GWI) and Verizon all filed Exceptions to the Report. We describe here only those Exceptions we address in this Addendum; the final order in this proceeding will address all of the Exceptions.

In their Exceptions, both Cornerstone and GWI point out that the Examiner's Report did not address the Commission's authority to order access to the new UNE pursuant to Section 271. Both argue that Section 271 provides an independent basis upon which the Commission could require Verizon to provide access to the requested UNE. We agree that our Examiner's Report should address this issue and will do so below.

In its Exceptions, Verizon contends that the FCC eliminated the copper feeder subloop requirement when it defined a subloop as terminating at an end-user's premises. Verizon also contends that any Commission decision to require access to copper feeder plant would be inconsistent with the federal unbundling decisions in the FCC's *Triennial Review Order* (*TRO)*[1] and, therefore, preempted by federal law. Verizon also argues that a Commission ruling that SOI did not have to follow Verizon's BFR process violates Verizon's constitutional rights to enter into contracts. Finally, Verizon argues that it cannot meet the 90-day deadline for provisioning the new UNE because of numerous operational support systems (OSS) and billing issues. We disagree with Verizon's assertions and will provide more detailed support for our positions.

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (rel. August 21, 2003).

III. ANALYSIS

A. Commission Authority Under Section 271

Section 271 of the TelAct sets forth the requirements an ILEC must meet before it will be allowed to enter the interLATA toll market. The so-called "competitive checklist" contains 14 measures which were intended to ensure that the ILEC had opened the local exchange market to competition. Once an ILEC gains entry into the interLATA market, it must continue to meet the 271 Checklist or face suspension of its authority to operate in interLATA markets. In the *TRO*, the FCC pointed out that despite the fact that the FCC was relieving the ILECs of certain unbundling requirements under section 251 of the TelAct, the ILECs had a continuing obligation to unbundle many elements under section 271.[2]

In order to determine whether Verizon has a continuing 271 obligation to provide access to subloops, we must first determine whether and where section 271 requires access to subloops. Checklist Item No. 2 requires "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)." Section 251(c)(3) requires ILECs to provide unbundled access to their network, i.e. UNEs, while Section 252(d)(1) sets the pricing standard for those UNEs, i.e., TELRIC. Thus, Checklist Item No. 2 requires an ILEC to meet all of the 251 and 252 unbundling and pricing standards in place at the time the ILEC files its 271 application. In a post-*TRO* environment, this means that the ILEC may be able to discontinue providing access to certain UNEs at TELRIC prices and still comply with Checklist Item No. 2.

[2] *TRO* at ¶ 653.

Checklist Item No. 4 requires an ILEC to provide access to "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." To the extent that this requirement includes UNEs already required under Checklist Item No. 2 and section 251, Checklist Item No. 4 does not add any additional requirements nor change the pricing requirement under Checklist Item No. 2. However, to the extent that the FCC has determined that ILECs are no longer required to unbundle certain loops (e.g., Ocn loops, Fiber to the Home), Checklist Item No. 4 requires the ILEC to continue to provide those loops. The FCC has interpreted this continuing requirement to include provision of these loops at "just and reasonable" rates pursuant to sections 201 and 202 of the TelAct, rather than at TELRIC rates pursuant to section 252 of the TelAct.[3] Thus, if subloops are considered "loops" under Checklist Item No. 4, Verizon may be required to continue to provide them, albeit at different rates.

In our Findings Order on Verizon's 271 Application, we found that Verizon met Checklist Item No. 4 and had provided access to its loops.[4] In reaching that conclusion, the Commission relied upon assertions made in Verizon's 271 filing concerning its provision of loops and subloops. Verizon included its discussion of subloop unbundling within the section of its Declaration that addressed loop unbundling issues.[5] The subloop portion of the Checklist Declaration cites to the FCC's Order approving Verizon's Massachusetts's 271 Application, which found that Verizon

[3] *TRO* at 656.

[4] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Order at pp 33-47.

[5] *See* Verizon Maine 271, Checklist Declaration at ¶ 166 -170.

provided nondiscriminatory access to subloops consistent with the requirements of section 271 and the *UNE Remand Order.*[6] Footnote 482 of the FCC's Verizon MA 271 Order contains an important distinction regarding Verizon's provision of subloops. Specifically, the FCC pointed out that:

> Although nondiscriminatory access to subloops ***technically falls under checklist item 2***, we treat subloops in this section [Checklist Item No. 4 – loops] because it is logically related to provision of unbundled loops.[7]

(emphasis added).

This categorization of subloops as a section 251/252 requirement is further supported by the FCC's *UNE Remand Order* which, in requiring access to subloops, did not mention section 271.[8] In addition, the *TRO,* which addresses unbundling requirements pursuant to section 251, lists subloops not as a type of loop (like dark fiber or linesharing) but as a separate UNE (like switching or transport).[9]

All of this leads us to conclude that Verizon does not have a continuing 271 Checklist Item No. 4 (loops) obligation to provide subloops but instead has only a 271 Checklist Item No. 2 (access to UNEs) obligation to provide those subloops specifically required under section 251. This conclusion brings us full circle back to the analysis laid out in the Examiner's Report at pp. 9 – 12 concerning our interpretation of the *TRO,* section 251, and federal preemption issues. We continue to believe that the

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[6]Declaration at ¶ 166 citing *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 154 (*Verizon MA 271 Order*).

[7]*Verizon MA 271 Order* at fn. 482.

[8]*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, Third Report and Order And Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, rel. November 5, 1999 ("UNE Remand Order") at ¶ 207.

[9]*See* 47 C.F.R. § 51.319.

Commission has authority to require Verizon to provide the requested UNE, both pursuant to the *TRO* and as an exercise of state commission continuing authority pursuant to section 251(d)(3). We will not repeat our analysis concerning interpretation of the *TRO* but will respond to the issue raised by Verizon at p. 6 of its Exceptions and expand upon our analysis of the Commission's authority under section 251(d)(3) and federal preemption issues.

B. Interpretation of the *TRO*

On p. 6 of its Exceptions, Verizon argues that because the FCC defined a subloop as terminating at an end-user's premises, the FCC eliminated both copper and fiber feeder subloops. We believe, despite this fact, that the FCC did not intend to eliminate copper feeder subloops. Our belief is supported by a review of the FCC's discussion of subloops within the context of overarching guiding principles discussed in other sections of the *TRO.*

First, the FCC's Rules do not explicitly state that copper feeder subloops should or should not be available. Therefore, guidance on this issue should be sought from the *TRO*, beginning with paragraph 253 which discusses availability of UNE subloops. The language of paragraph 253 indicates that the FCC clearly intended to continue access to copper distribution subloops ("We require incumbent LECs to provide unbundled access to their cooper subloops, i.e. the distribution plant") and to eliminate fiber feeder subloops ("we do not require incumbent LECs to provide access to their fiber feeder loop plant"). However, there is nothing in paragraph 253 nor anywhere else in the *TRO* that makes a specific non-impairment finding with respect to

the copper feeder portion of the network; indeed, there is no language specifically addressing copper feeder subloops.

In other parts of the *TRO,* when the FCC eliminated a section 251 requirement to provide a specific UNE, it made that decision explicitly (e.g., at paragraphs 259 and 261 it explicitly made a finding that line sharing would no longer be a section 251 UNE). Furthermore, unlike in other areas of the *TRO* where a finding of non-impairment is predicated on the availability of other sources of supply (e.g., paragraph 263's discussion of cable modems), Verizon cannot point to anything in the *TRO* that suggests that there is an alternative source of supply for copper feeder subloops available to SOI.

Throughout the *TRO,* the FCC relied upon two central principles/policy objectives to support it's decision: it wanted to encourage all carriers to build new infrastructure and to offer new services and technologies. Indeed, the FCC's decision not to mandate unbundling of next generation networks was predicated on providing ILECs and CLECs the incentive to invest in new technologies.[10] This argument, however, does not apply to copper feeder because, unlike the new fiber-to-the-home (FTTH) technology mentioned at paragraph 273, the legacy copper facilities already exist. It can also not be contended that mandating copper feeder subloop unbundling will seriously impair investment in new technologies. For if the argument did apply, it would apply with equal weight to copper distribution cables and no such argument can be found in the *TRO*. Finally, while paragraph 275 states that ILECs have no advantage over CLECs in "Greenfield" applications (new FTTH deployments) and, therefore, it is not necessary to unbundled newly-built ILEC fiber, this is not the case

[10] *TRO* at ¶ 272.

with broadband services provided over copper. Verizon does have an advantage in providing xDSL over the existing copper legacy network because Verizon has already installed the copper feeder and, therefore, it is a sunk cost.

Paragraph 278 of the *TRO* discusses how next generation services such as FTTH provide an array of new services that are not feasible with xDSL and that CLECs are leading in the deployment of FTTH. The FCC finds that, in order to encourage further deployment by both ILECs and CLECs, ILECs will not be required to provide unbundled FTTH. Thus, the FCC clearly distinguishes between next generation networks providing next generation services and legacy networks providing existing services such as broadband. The FCC's determination not to unbundle fiber yet retain copper unbundling requirements reflects its desire to encourage both use of existing technologies to provide xDSL service and deployment of new fiber to provide new broadband services.

The FCC also requires ILECs provide access to non-packetized fiber so that CLECs can continue to provide broadband services at speeds up to DS-3.[11] Again, the FCC explicitly distinguished between existing and new technologies; CLECs should have access to legacy technologies so that they could provide broadband services but should not have access to new, packetized technologies that both they and the ILECs must build new. Interestingly, at paragraph 291, the FCC states that its earlier requirement of access to "incumbent LEC copper subloops" adequately addresses CLEC impairment "so that intrusive unbundling requirements on incumbent LEC packetized fiber loops facilities is not necessary." Thus, the FCC acknowledges that

[11] *TRO* at ¶ 289.

denying access to the legacy copper network would be an impairment for the provision of xDSL services such as those proposed by SOI.

The FCC goes further and explains that "subloop access promotes competitive LEC investment in next-generation network equipment (e.g., packet switches, remote DSLAMs, etc.) and transmission facilities (e.g., fiber loop facilities built to points in incumbent LEC networks closer to the home)."[12] This decision furthers the FCC's goal of promoting innovation because it "enables competitive LECs to differentiate their product and service offerings from those of the incumbent LEC." SOI's proposal to use Verizon copper feeder subloops achieves the goals identified by the FCC; it allows SOI to place DSLAMs in locations different from Verizon and to provide a faster, higher quality xDSL service.

In summary, with the exception of the FCC's definition of a subloop terminating at an end-user premises, everything else in the *TRO* is consistent with our initial analysis and recommendation. Providing SOI with access to Verizon's legacy technology fulfills the FCC's objective of promoting infrastructure investment and broadband deployment while making good use of existing technology in areas not currently eligible for broadband services.

C. Federal Preemption

In its Exceptions, Verizon contends that any Commission decision to require access to copper feeder plant would be inconsistent with the federal unbundling decisions in the *TRO*. As stated above, Verizon asserts that the FCC eliminated all section 251 CLEC access to feeder subloops – both copper and fiber. Thus, any decision by a state commission to require access to feeder subloop facilities is

[12] *Id.* at ¶ 291.

inconsistent with the *TRO* and preempted by section 251(d)(3) of the TelAct. We disagree with Verizon.

Section 251(d)(3) states that the FCC may not preclude enforcement of any state commission decision establishing local exchange interconnection and access requirements which is consistent with section 251 and which "does not substantially prevent implementation of the requirements of this section." In the *TRO,* the FCC asserts that its interpretation of the requirements of section 251, i.e., its Rules, were intended by Congress to be included under the "requirements of this section" language of section 251(d)(3). *TRO* at 191. Thus, according to the FCC, any state decision that is inconsistent with the FCC's Orders or Rules (the so-called "federal regime") violates section 251(d)(3) and is preempted.

However, the FCC's assertion that its Rules are included in "the requirements of this section" was specifically rejected by the Eighth Circuit Court of Appeals during the legal battle over the FCC's *First Report and Order*[13] which implemented the TelAct.[14] The Eighth Circuit held that section 251(d)(3) does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251.[15] It stated that "[t]he FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical."[16]

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[13] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499(1996).

[14] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd sub nom. on other grounds, AT&T v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

[15] *Id.* at 806.

[16] *Id.* It further held that section 261(c) of the TelAct (which requires state commission decisions to be consistent with the FCC's regulations) applies only to state requirements that are not promulgated pursuant to section 251. *Id.* at 807.

While portions of the Eighth Circuit's decision were ultimately reversed by the Supreme Court, the FCC did not challenge, nor did the Supreme Court reverse, the Eight Circuit's holding on section 251(d)(3).[17] Thus, contrary to the assertions of both the FCC and Verizon, the mere fact that a state requires an additional unbundled element does not mean it automatically will be preempted. Instead, consideration must be given to whether the requirement is consistent with section 251 and whether it prevents its implementation.

First, we look to the requirement that the state decision be "consistent" with section 251. In analyzing the legislative intent behind a statutory requirement that two mandates be consistent, courts have defined the word by its common usage, as found in the dictionary. *See e.g. Cross v. Warden, N.H. State Prison*, 644 A.2d 542, 543 (N.H. 1994)(the meaning of "consistent" is synonymous with "consonant" or "compatible."); *Ryan v. Roach Drug Co.*, 239 P. 912, 914 (Okla.1925) ("'Consistent' means not contradictory, compliable, accordant."); *Baldwin-Heckes Co. v. Kammerlohr*, 242 N.W. 661, 663 (Neb. 1932) ("'Consistent,' as defined in Webster's New International Dictionary, includes, 'having agreement with itself or something else; accordant, harmonious, congruous, compatible, not contradictory."). Courts have also concluded that two designs may be consistent even if one contains additional elements. *Lake City Corp. v. City of Mequon*, 558 N.W.2d 100, 104 (Wis.1997) ("so long as any issues addressed in both a master plan and an official map are not contradictory, the master plan is consistent with the official map.").

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[17] *See TRO* at ¶ 192, fn. 611.

The Supreme Court of Vermont addressed the "consistency" issue on a challenge to an order of the Vermont Public Service Board "requiring a telecommunications company to make certain facilities or services available to competitive local exchange carriers."[18] Verizon argued that the Board's order was inconsistent with federal law and not supported by independent state authority.[19] In holding that there was ample state authority to support the order and that the order did not contradict federal law, the Vermont court described how Congress intended the Act to work in conjunction with state regulatory commissions:

> The Telecommunications Act of 1996 fundamentally amends the Communications Act of 1934, the principal legislation that regulates telecommunications and established the FCC. . . . The use of a federal statute by a state board is consistent with the federal government's approach to telecommunications regulation, in which states are considered partners in regulation. In both the 1934 Act and the 1996 Act, Congress has taken pains to preserve the overlapping jurisdiction of the states and the federal government over the telecommunications industry. . . . Congress did not intend to occupy the field of telecommunications regulation, it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act.[20]

The court went on to explain that the "federal scheme does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act . . . federal law sets only a floor, the requirements of which may be exceeded by state law."[21] Furthermore, the Vermont court emphasized that when compliance with a state commission's order does not interfere with a carrier's ability to comply with

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[18] *In re Petition of Verizon New England Inc. d/b/a Verizon Vermont*, 795 A.2d 1196 (Vt. 2002).

[19] *Id.* at 1198.

[20] Id. at 1201.

[21] *Id.* at 1204.

federal law, there is no conflict between the state and federal regulations.[22] The court concluded that "state law does not interfere with federal law where state law imposes stricter standards than federal law."[23]

Thus, a state commission requirement, such as that proposed in this proceeding, which requires an ILEC to unbundle portions of its network not required by the FCC, should be considered consistent with the federal regime in that it imposes additional, not contradictory, requirements on the ILEC. Indeed, there is nothing about requiring Verizon to provide access to the UNE requested by SOI that would preclude Verizon from meeting its federal unbundling requirements nor would it require Verizon to take action that would be considered illegal by the FCC.

The second standard under which our proposal must be evaluated is whether it would "substantially prevent" implementation of section 251 of the TelAct. The FCC admits in footnote 611 of the *TRO* that the Eighth Circuit's interpretation of section 251(d)(3) is the law of the land and that mere inconsistency with the FCC's rules is not enough to trigger federal preemption but instead the state access and unbundling requirements must "substantially prevent" implementation of the "federal regime." While we agree with the FCC that the state scheme must substantially prevent implementation of the federal requirements to trigger preemption, we disagree with the FCC's definition of those federal requirements. As discussed earlier, the FCC asserts that "the federal regime" includes both the TelAct and the FCC's Rules implementing the TelAct. Again, however, that interpretation has been struck down by the Eighth Circuit and is at odds with the plain language of section 251(d)(3) which says "substantially prevent

[22] *Id.* at 1205.

[23] *Id.* at 1207.

implementation of the requirements of *this section* and the purposes of this part." (emphasis added)[24]

Our conclusion that requiring Verizon to provide the new UNE pursuant to section 251 does not substantially prevent implementation of section 251 is bolstered by our review of federal preemption case law. The Supreme Court has held that "preemption will not lie unless it is 'the clear and manifest purpose of Congress.'"[25] If the statute contains an express preemption clause, the court will first focus on the plain wording of the clause, "which necessarily contains the best evidence of Congress' preemptive intent."[26] Savings clauses, which specifically reserve state authority, are "the best evidence of Congress' preemptive intent."[27] Generally speaking, preemption will be found where State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[28] What constitutes a sufficient obstacle, however, is a matter of judgment, informed by examining the statute as a whole and identifying its purpose and intended effects.[29]

Where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is presumed that Congress has

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[24]The Sixth Circuit recently held that the standard is whether state law "substantially prevent[s] implementation of the *purposes* of the Act." *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348 353 (6th Cir. 2003)(emphasis added).

[25]*CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[26]*Id.*

[27]*Id.*

[28]*Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).

[29]*Id.*

acted intentionally and that the omission or inclusion had a specific purpose.[30] A review of the TelAct, reveals that where Congress wanted to grant the FCC exclusive jurisdiction over a matter, it did so directly. *See* e.g., 47 U.S.C. § 251(e)(1)(3) (granting FCC "exclusive jurisdiction" over numbering and allowing delegation to state commission); 47 U.S.C. § 276(c) (preempting state requirements that are inconsistent with the FCC's regulations on payphone service). Contrast these provisions with section 251(d)(3) which does not mention "FCC regulations" or "exclusive jurisdiction." Quite the opposite: section 251(d)(3) clearly opens the door to state action which is *consistent with* the TelAct but *different from* the FCC's regulations by not mandating exclusive jurisdiction by and by failing to specifically mention federal regulations.

We recognize that the issues and analysis concerning state authority under the TelAct are being considered in the pending appeal of the *TRO* at the D.C. Circuit Court of Appeals and that the entire scheme set forth in the *TRO* could be reversed at any time. Both state commissions and the industry are once again in the position of trying to perform their regulatory duties or run their businesses in the midst of extreme uncertainty concerning the federal regulatory framework. We are reminded of the situation the Commission found itself in when trying to establish TELRIC prices for UNEs, with multiple standards established and interpreted by the FCC, the courts, and state commissions. As the Commission said in the TELRIC Order:

> The Commission must consider all of the varying standards and legal decisions promulgated by the FCC and the courts in determining the pricing standard to be applied in this proceeding. It must also account for public policy considerations including the TelAct's promotion of competition in the local exchange markets and state policies encouraging economic development and consumer

[30] *Bates v. U.S.*, 522 U.S. 23, 29-30 (1997).

> interests... At this time, we believe the most prudent course of action is to follow, to the extent the record allows, the language of the TelAct itself... [31]

We believe relying on the words of the TelAct itself provides the best basis for the Commission's decision in this case. Section 251(c) requires an ILEC to provide nondiscriminatory access to network elements at any technically feasible point while section 251(d)(2) requires that consideration be given as to whether access is necessary and whether lack of access would impair the requesting carrier. In addition to the reasons contained in the Examiner's Report, we believe, as will be discussed below, that the unique circumstances of rural Maine require access to the new UNE.

D. Access to Feeder Subloops

During the course of this proceeding, SOI and the other CLECs established the need for access to the new UNE in order to bring broadband services to rural Maine. SOI witness Burke testified that access to the new UNE would enable him to serve areas where there are insufficient UNE loops available for SOI to order full loops.[32] By using the new UNE, SOI would be able to serve 20 or 30 customers with one Verizon loop and 20 or 30 SOI-built distribution cables. In his prefiled testimony, SOI witness Burke testified that using Verizon's existing remote terminal (RT) collocation service offerings was economically and technically infeasible.[33] SOI testified that Verizon supplies service to its customers in the Skowhegan exchange with a total

[31] *Investigation of Total Long Run Incremental Cost (TELRIC) Studies and Pricing of Unbundled Network Elements*, Docket No. 97-505, Order at 5.

[32] Tr. 6/18/03 at 32.

[33] SOI Pref. Test. (12/30/02) at 1.

of 18 digital loop carrier (DLC) RT locations.[34] Most of the locations are served by obsolete SLC-96 and SLC-5 types of DLCs and have less than 100 lines each (some with 30 or less).[35] Most of these systems are completely full inside the cabinet and have no capability of supporting any services beyond Plain Old Telephone Service (POTS).[36] Further, most of the systems are configured in a way that does not allow for good quality narrowband modem connections, let alone high-speed broadband connections.[37] Verizon did not contest SOI's allegations concerning the nature of its outside plant in the Skowhegan exchange.

SOI witness Burke also testified that under normal conditions, a DLC will be engineered such that the customer loop does not exceed 12 kft.[38] However, Verizon's outside plant has a "fair number" of DLC served lines which exceed 20 kft., many of which bypass DLCs closer to the central office to run to DLCs that are farther away.[39] Indeed, in some places, the DLC-served customer subloop is 20% or more longer than it would be if it were served directly from the central office.[40] For a CLEC to provide service under these conditions, it must configure its network in a way that allows it to overcome the distance limitations of digital subscriber line (broadband) technology. SOI proposed to do this by building its own distribution subloops, aggregating them at

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

one location, and using one Verizon loop to get back to the central office. SOI asserts that service provided via this method will dramatically shorten the customer loop and allow for much higher service speeds, greater reliability, and efficient use of the proposed UNE.[41]

GWI filed testimony in support of SOI's request asserting that in order for CLECs to provide broadband and other innovative services, they need to deploy RTs in a topology different than that of the Verizon network which was designed for narrowband services.[42] Further, GWI provided statistics showing that over 50% of customers who were hoping to subscribe to GWI's broadband services in six suburban exchanges (Biddeford, Kennebunk, Rumford, Rockland, Westbrook and Lisbon Falls) were disqualified because of the architecture of Verizon's network.[43] GWI urged the Commission to allow CLECs to "squeeze improved service out of the existing cooper network" by making use of the UNE proposed by SOI.[44]

We find that the record clearly establishes that in Verizon's Skowhegan exchange, due to Verizon's configuration of its network and the quality of its DLC systems, SOI is impaired without access to Verizon's cooper feeder subloops. We also find, based upon our knowledge and familiarity with Verizon's outside plant and Maine geography, that these same findings likely apply in many Maine exchanges. All of Maine's exchanges except Portland are considered suburban or rural like the

[41]SOI Pref. Test. (1/09/03) at 1.

[42]GWI Pref. Test. at 3.

[43]*Id.* at 5.

[44]*Id.* at 7.

exchanges discussed by SOI and GWI.[45] Further, there has been no testimony that the network topology in the Skowhegan exchange is dramatically different from other Maine exchanges. Indeed, Verizon witness Lucas testified that there were approximately the same percentage of spare cable pairs available in the rural and suburban exchanges.[46]

We also believe, for all the reasons stated in the Examiner's Report, that federal and state policies calling for the expansion of broadband to rural areas provide additional support for granting SOI's request. SOI, Cornerstone, and GWI have all testified that they will use the new UNE to bring broadband to areas in rural Maine that not only do not have a choice in broadband supplier but do not have any broadband available at all. We believe, based upon the efforts these companies have already made to bring broadband to rural areas, that they will, in fact, expand the availability of broadband in rural Maine. As lawmakers, politicians, and average citizens from all over the country have said, the availability of broadband services supports economic and social development for all.

Thus, we recommend the Commission assert its authority pursuant to section 251(d)(3) of the TelAct and order Verizon to make the UNE requested by SOL available to all CLECs in Maine.

E. Necessity of Resort to BFR Process

Verizon argues in its Exceptions that even if the Commission orders it to provide SOI and other CLECs with the new UNE, SOI must participate in a BFR process required by SOI's interconnection agreement with Verizon. Verizon asserts that the Commission cannot circumvent or supercede these requirements without

[45] *See* Trans. 6/18/03 at p. 100.

[46] *Id.*

violating Verizon's constitutional right to enter into binding contracts. Verizon's arguments are without merit and should be rejected by the Commission.

First, and most fundamentally, the Commission approved SOI's interconnection agreement by Order dated August 15, 2002, in Docket No. 2000-627. Pursuant to 35-A M.R.S.A. § 1321, the Commission may re-open and reconsider any Order previously issued. Thus, the Commission could re-open the Order approving the SOI interconnection agreement and consider whether the BFR provision, as drafted in that particular agreement, is against the public interest. For the reasons we discuss below, we believe resort to this step is not necessary. However, if the Commission does not find our other reasoning sufficient, we urge the Commission to re-open the SOI interconnection agreement and strike the BFR provision in the SOI contract and replace it with the BFR provision found in the AT&T or Mid-Maine interconnection agreements which do not require use of the BFR if the FCC or state commission has ordered the availability of the UNE.

Second, while SOI originated the request for this UNE, other CLECs have joined in the request while others will likely take advantage of the ruling in the future. Some of these additional CLECs have different BFR provisions in their interconnection agreements. Specifically, the AT&T/Verizon interconnection agreement, which was used as the model for many Maine interconnection agreements, provides that:

> Any request by ANTC for access to an [sic] BA Network Element that is not already available and is not specifically required to be offered under regulations or orders of the FCC or the Commission shall be treated as a Network Element Bona Fide Request.[47]

[47] AT&T/Verizon Interconnection Agreement, § 11.8.1.

The Mid-Maine/Verizon interconnection agreement, the other major agreement after which other agreements were modeled, provides that:

> BA shall, upon request of Mid-Maine, and to the extent required by Applicable Law, provide to Mid-Maine access to its Network Elements on an unbundled basis . . .[48]

Neither of these agreements require use of the BFR process if the state commission has ordered the availability of a UNE. Thus, had a CLEC which adopted much of the Mid-Maine agreement been the lead CLEC, Verizon could not have raised these issues.

Finally, the Commission should reject Verizon's arguments because, by conducting this proceeding, the Commission has provided both the time and the opportunity for Verizon to address all of the issues allegedly covered in the BFR process. Specifically, Verizon claims that use of the BFR process is necessary to address issues regarding its procedures, practices, OSS systems, and cost recovery.[49] However, at the hearing in this matter, Verizon conceded that many of the issues it had raised were not, in fact, obstacles to implementation of the UNE. For example, Verizon witness Rousey conceded that Verizon's OSS systems should allow for a pole number to be substituted in the ordering field normally used for the end-user's address.[50] Verizon witness Lucas also conceded during cross-examination by SOI that, when ordering a Verizon retail product, the Verizon OSS system includes a field for pole number.[51] Indeed, the OSS system uses the customer's street address to determine the closest pole number, which provides Verizon technicians with critical information

[48]Mid-Maine/Verizon Interconnection Agreement, § 11.12.1.

[49]Rousey Pref. Test. at 6.

[50]Tr. 6/18/03 at 57.

[51]*Id.* at 110-111.

concerning where and what they need to do.[52] SOI testified that Verizon's loop make-up database usually contains the serving pole number for each retail customer.[53]

As for testing issues, Verizon witness Lucas agreed that, where the CLEC uses a NID for interconnection, remote testing by Verizon would be done the same way it is already being done for residential UNE loops.[54] Further, during cross-examination, Verizon witness Lucas conceded that existing procedures for obtaining a pole license could address Verizon's concerns about where the CLEC would locate its NID.[55]

Regarding OSS modifications, Verizon witness Rousey conceded that existing billing and ordering codes might be able to be used and that no modification to the OSS would be necessary.[56] Most importantly, Verizon conceded that in the former GTE areas, there already exists a standard UNE offering that is the functional equivalent of the UNE requested by SOI.[57] A late-filed response to an oral data request indicates that the same UNE is also available under Verizon Pennsylvania's tariff PUC No. 216.[58] Witness Rousey also stated that under the BFR process, SOI would be responsible for all OSS modification costs, whereas if the UNE already existed, those OSS costs would be recovered in either the recurring or non-recurring costs associated with the UNE.[59]

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[52] *Id.*

[53] *Id.* at 112.

[54] *Id.* at 68.

[55] *Id.* at 72.

[56] *Id.* at 71.

[57] *Id.* at 78.

[58] Response to Oral Data Request No. 1.

[59] Tr. 6/18/03 at 76.

Given the existence of the UNE in other jurisdictions, we believe OSS issues should not require resort to the BFR process which address totally new UNEs.

We find that Verizon failed to present testimony establishing specific obstacles to implementing the new UNE. As the OPA pointed out during the hearing, Verizon's counsel made many factual assertions concerning OSS issues but failed to bring witnesses to address those issues.[60] Indeed Verizon's witnesses admitted they were not prepared to respond to technical questions regarding Verizon's OSS systems and Mr. Rousey claimed that another Verizon product manager would be responsible for the BFR process.[61]

Thus, instead of coming prepared to address the obvious raised by SOI's request, Verizon took a position that it often does before the Commission: modifications to its practices or procedures which benefit other carriers or consumers require extensive amounts of time and money to complete while modifications which benefit Verizon must be approved and implemented immediately. For example, Verizon requested numerous extensions concerning the Commission's new consumer rules because of claimed difficulties in changing its legacy billing systems yet within 60 days of release of the *TRO* was prepared to implement all new rules which benefited it.[62] We find that if Verizon can find the resources to implement changes to its OSS, practices, and procedures required by the *TRO* within 60 days, it can find the resources to implement one additional UNE without resort to a BFR process.

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[60] *Id.* at 68.

[61] *Id.* at 55, 60, 76.

[62] *See Industry Letter* dated October 2, 2003 from Jeffrey Masoner to all CLECs.

With regard to cost recovery, we find that existing Commission-ordered UNE rates should be used unless and until Verizon submits a cost study for our approval or the parties reach an agreement regarding price. Specifically, existing loop/subloop rates as well as standard non-recurring costs should be used to recover the costs associated with each piece of physical equipment provided. As a compliance filing to the Commission's Order, Verizon should file a list of each of the charges that will be associated with a CLEC order for the new UNE. As for the costs associated with modifying Verizon OSS systems to accommodate this UNE, Verizon may amend the cost study it filed in Docket No. 2002-682 relating to OSS cost recovery to include the costs associated with this new UNE.

Respectfully submitted,

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Trina M. Bragdon
Hearing Examiner